

**BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO**

IN THE MATTER OF APPLICATION)	
FOR TRANSFER NO. 5435 IN THE)	PRELIMINARY ORDER
NAME OF STEVE AND DARLA)	
WYBENGA)	(Note: This order has now become final
_____)	because requests for reconsideration
_____)	were not filed.)

This matter having come before the Idaho Department of Water Resources (the "Department") as an application for transfer and the Department having held a conference and a hearing in a similar matter involving part of the same water right, the Department enters the following Findings of Fact, Conclusions of Law and Preliminary Order:

FINDINGS OF FACT

1. On May 10, 1995, the Department issued License No. 35-08606 in the name of Roy E. Hincks as follows:

Source:	Groundwater
Priority:	July 1, 1985
Rate of diversion:	6.07 cubic feet per second ("cfs")
Volume:	1214 acre feet per year ("afy")
Point of diversion:	NE1/4NW1/4, Section 16, T4S, R31E, B.M. ("Hincks" well)
Use:	Irrigation
Season of use:	April 1 to October 31
Place of use:	303.5 acres within parts of Section 16, T4S, R31E, B.M.

(Note: The "1/4" designations will be omitted from subsequent legal descriptions in this order).

2. On March 3, 1999, Roy Hincks ("Hincks") agreed to sell 15 miner's inches (0.30 cfs) of water from License No. 36-08606 to Steve Wybenga ("applicant").

3. On March 8, 1999, the applicant filed Application for Transfer No. 5435 ("application") with the Department seeking to change the point of diversion, place of use, season of use and nature of use of a portion of License No. 35-08606. Hincks proposes to cease the diversion of 0.30 cfs and 45 afy of ground water from the Hincks well and to allow the water to be diverted from the applicant's existing well located in Section 30, T5S, R13E, B.M. in Gooding County, Idaho. The applicant proposes to use the water in an existing dairy facility diverting the water from a well which is located down gradient of the licensed well a distance of approximately 90

miles.

4. The Department published notice of the application which was protested by several parties.

5. On July 27 and 28, 1999, the Department conducted a hearing in the matter of Application for Transfer No. 5436 in the name of Jerome Cheese Company. The application of Jerome Cheese Company involved a portion of water right 35-08606 in a proposed transfer which is similar to Application for Transfer No. 5435. As a result of the hearing, the Department denied Application for Transfer No. 5436 as not being in the local public interest.

6. The majority of water not pumped at the Hincks well is tributary to springs which enter the Snake River in the Blackfoot to Neeley reach or below Neeley. Some of the unpumped water will go west in the aquifer but ground water reaching the Snake River will not again be available as ground water in the Snake Plain Aquifer.

7. On May 15, 1992, the Director issued a moratorium order curtailing the use of surface and ground water within the Snake River Basin upstream from the USGS gauge on the Snake River near Weiser, Idaho ("Snake Plain Aquifer"). The moratorium was issued to prevent further development of water resources in the Snake Plain Aquifer to ensure compliance with provisions of chapter 2, title 42, Idaho Code. The Director subsequently amended the moratorium order on January 6, 1993 and April 30, 1993.

CONCLUSIONS OF LAW

1. Section 42-222, Idaho Code, provides in pertinent part as follows:

The director of the department of water resources shall examine all the evidence and available information and shall approve the change in whole, or in part, or upon conditions, provided no other water rights are injured thereby, the change does not constitute an enlargement in use of the original right, and the change is consistent with the conservation of water resources within the state of Idaho and is in the local public interest as defined in section 42-203A(5), Idaho Code ;

2. Section 42-1805(7), Idaho Code, and IDAPA 37.03.08055 (Water Appropriation Rule 55) provide for the establishment of a moratorium preventing further development of a water resource in a designated area to ensure compliance with provisions of chapter 2, title 42, Idaho Code.

3. The moratorium designated by the Department on May 15, 1992 for the Snake Plain Aquifer was issued to prevent further development of water sources on the plain in order to protect prior water rights and to ensure compliance with provisions of chapter 2, title 42, Idaho Code.

4. The proposed point of diversion by the applicant for the dairy is within the Snake Plain Aquifer area. Since only a small unquantified portion of ground water which would not be pumped at the Hincks well would reach the proposed new well located about 90 miles to the southwest, the diversion of 0.30 cfs or the majority thereof at the proposed new well would have the same physical effect as a new appropriation of ground water and would cause injury because it would have a senior priority over validly established water rights held by junior appropriators.

5. It is not in the local public interest to approve a transfer that would essentially be a new appropriation of water which would otherwise be prevented by the moratorium.

6. The Department should deny the application.

ORDER

IT IS THEREFORE, hereby ORDERED that Application for Transfer No. 5435 in the name of Steve and/or Darla Wybenga is **DENIED**.

Signed this 25th day of May, 2000.

/Signed/
L. GLEN SAXTON, Chief
Water Allocation Bureau